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Communication in the Courtroom

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By:

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Communication

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ABSTRACT

An attorney's communication style-not just what he or she says, but how he or she says it-can affect the outcome of a trial. By performing a meta-analysis of thirty-four peer-reviewed articles on this subject, areas where research is plentiful and areas where research may be lacking are identifiable. Variables for this project include the type of communication, the type of legal case, mention or lack thereof of attorney-communication training, and the sample subject. Upon analysis of these articles, it was found that research in the areas of verbal and non-verbal communication, attorney-jury communication, and criminal cases is plentiful. Future research on attorney communication styles should focus on types of attorney communication training, how an attorney's communication affects both judge and client, and attorney communication styles within civil cases.

Communication in the Courtroom

Communication in the courtroom. A very obvious occurrence. Plainly, in any courtroom a great deal of communication occurs: the witnesses, clients, attorneys, jury members, and judges all communicate amongst themselves. Attorneys, in particular, are essential in the outcome of a court case. They communicate all of the facts of the case, along with their client's arguments, to the judge and/or jury that rules on the case.

Attorneys in ancient Greece and Rome were first orators. Their public speaking skills made them influential in their societies. Their oratory abilities were the primary reason for which they became lawyers because they were able to communicate their clients' arguments well. This tradition continued through to modern day attorneys: courtroom lawyers must be affective communicators.

Because the attorney's communication is so crucial to the outcome of a case, the topic at hand is how the attorney's verbal and nonverbal communication can change the outcome of a trial. Obviously what an attorney says effects the outcome of the case. However, can the *way* he or she says it also affect the outcome? For example, if an attorney speaks in a laid back manner, an aggressive manner, or a cheerful manner, can the manner in which he speaks affect how the jury or judge perceives what is said and, in turn, affect the ruling accordingly? Could the way that an attorney communicates nonverbally affect the outcome as well?

Upon examining this topic, it was found that much research has been done in this area. This research encompasses various areas of the law, as well as different genres of communication. It became apparent that the most effective method of conducting research in this area is through a meta-analysis. A meta-analysis allows one to observe where the research

into a certain area is plentiful and where it is lacking by analyzing a large collection of articles on a certain topic according to certain variables.

Variables

The variables in this project were the type of legal case, the type of communication, the subject of the sample, and whether the communication training of the attorney was mentioned. This research type is a 3x3x4x2. The levels of the type of legal case were criminal, civil, or not listed. The levels of the type of communication include verbal communication, nonverbal communication, and a combination of both verbal and nonverbal communication. The levels of subject of the sample include the judge, jury, client, and attorney. The levels concerning whether or not communication of the attorney is mentioned are “yes” or “no.”

The samples collected for this project all included certain types of legal cases that were either being examined through an experiment, handled by the attorney who was the subject of the case, or sometimes not listed in any way. These cases are included in the variable of the type of legal case. Those which fall under the category of criminal cases are those in which the facts of the case include some sort of danger or harm. Civil cases are those which are between individuals or organizations and result in the giving of money from one party to another. For most samples in which the type of case was listed, it was plainly listed as such; however, in others it was evaluated based on the facts of the case that were given in the text.

The type of communication for this project falls into the category of verbal, nonverbal, or both. Communication is considered, for this meta-analysis, as the exchange and reception of messages among people. Verbal communication includes communication that is only exchanged from the mouth and voice and what is actually said: the oral message. Nonverbal

communication includes that which is communicated using gestures, facial expressions, body language, and everything else that conveys a message in a means other than verbally.

The samples of this project have many different subjects. Each article is about either the attorney alone and how he or she communicates; the way the attorney communicates to his or her client or how the client perceives the attorney's communication; or the way the judge perceives the attorney's communication. For all samples, attorneys included are only those who are licensed to practice law in some state, and those included are only those who practice in a courtroom. The communication of the attorney is also limited only to communication by the attorney in the context of a courtroom. That which the attorney exchanges outside the courtroom is not included, even that which might have applied to the case to which the sample refers. A jury, for the case of this project, is a jury of peers in any court system in the United States. A judge is considered anyone who is licensed to rule over any court in the United States. A client is anyone represented by the attorney that is being mentioned in the sample. However, just as with the attorney, clients included in this project are only those present within the physical courtroom.

The final variable is whether or not communication training of the attorney is mentioned in the article. Training is considered any type of studying or practicing in the area of communication that an attorney might have performed or done before the trial. This training is anything mentioned in the article from law school classes to post-school training that the attorney might have undertaken.

Practitioner's Approach

Rather than choosing a communication theory to relate to this project, it is more appropriate to utilize the practitioner's approach. This approach involves using the "tricks of the trade" in a specific practice. In this case, where the focus is on the attorney's communication, the strategies behind making a speech are applicable. The variables and levels of this project parallel strategies employed in public speaking. In David Zerefsky's *Public Speaking: Strategies for Success*, the author names several main strategies that are applicable to this project: adapting to your audience, using research to support your speech, using appropriate language, presenting your speech, and persuading (2005).

Adapting to the audience applies to the audience variable. This practice in the field of communication means that one reacts differently and delivers a speech differently according to whom he or she is delivering the speech. One reason why one of the main variables in this project is the subject of the sample is that attorneys in this project all spoke to a specific audience and tailored their speech to that specific audience. Using research to support one's speech is applicable to the variable of the attorney's training. If he or she has researched or been trained in communication, then this speaker will apply the research and training when giving the speech.

Using appropriate language is applicable to the type of case variable. If the case is a criminal case or one that deals with sensitive topics, the attorney uses different, more careful language. Presenting one's speech and persuading are both applicable to the variable of the type of communication. The presentation of the speech involves both types of communication. When attorneys present their speeches, they use body language and verbal cues, along with their usual styles of speaking.

Persuasion is practiced constantly in a courtroom: it is the entire purpose of the lawyer's argument. When the attorney speaks in front of a courtroom, the purpose of doing so is to persuade the jury or judge to believe what the attorney is saying. He or she does so using both verbal and nonverbal communication skills. The manner in which he or she conducts this communication can change how the act of persuasion is accomplished.

Literature Review

When beginning research on the topic of communication in the courtroom, it is important to look first at exactly what has been done in this area. This literature review contains some of the articles that were used for the meta-analysis. This literature review covers current research in the general field of an attorney's communication. The literature review is a more objective, non-coded review of fifteen articles. Three major themes arise from articles based on this subject. The first is the communication styles to which jurors best respond. The second is whether or not communication can affect the outcome of the trial. The last consists of the primary communication styles that lawyers employ.

Jurors.

The first research question concerns the communication style to which jurors best respond. This topic, it seems, has not been researched quite as extensively as the other two research topics. There still exists, however, some good information in this field. Authors that address this topic are Meyers, Schmitt, and Wigley. Wigley focuses his research on the kind of communication style in which the actual jurors themselves partake (1995). This includes the kind of communication in which those jurors chosen for trials partook- the kind of communication style used by jurors chosen to participate in the courtroom. It turns out that more talkative, friendly jurors are chosen more frequently (Wigley, 1995). This is important because

the lawyer needs to know the type of people with whom he or she is communicating to really communicate well.

In “Legal Beat: Judges Try Curbing Body-Language Antics,” Schmitt takes into account the ways in which jurors respond to a lawyer’s nonverbal communication and body language (1997). Many lawyers have caused controversy because of their over-the-top nonverbal communication. This author concluded that nonverbal communication can be extremely important in the outcome of cases and that lawyers have to be careful not to let it be too persuasive (Schmitt, 1997). Meyers, in her article “Examining Argument in a Naturally Occurring Jury Deliberation,” discusses the different communication theories that are applied to jurors that deliberate on a case (2010). The article did not offer too much in the way of stating which was best; instead, it states that all communication theories have merit (Meyers, 2010). The first two articles both have slightly common themes: they discuss the way that the jurors’ and the lawyer’s communication styles are, in fact, interrelated. The third article, however, is not quite in line with the others because it is much more technical. In other words, the third article did not offer as much information because it was written in a manner that made it rather difficult to understand.

Communication affecting outcomes?

The second research question encountered involved whether a lawyer’s communication style could actually alter the outcome of a case. Barber, Burnett, Joffe, McLaughlin, and Spivey discussed this in their articles. In Barber’s article, “Restrictions on Lawyer’s Communicating,” he discusses whether or not attorneys should be able to speak to clients during breaks, such as lunch breaks and recesses (2009). This could affect the outcome of the case because important information could be exchanged if this were allowed. In Burnett’s article, she discusses the

effect of the judge's communication style on the jurors and how sometimes a judge's nonverbal communication can affect the direction in which the jury votes (2005). Jurors respond best to judges who have better communication skills than those who do not (Burnett, 2005). Therefore, it is important to observe judges as well as lawyers because they have a potentially large effect on the verdict of the courtroom.

In McLaughlin's article, he considers how communication can affect the way that a jury votes (1979). If a lawyer communicates in a particular style, the jury members are likely to change the way that they were planning to vote (McLaughlin, 1979). In Joffe's article, "Oops! Can I Take it Back?" she discusses how the different communication channels could allow important, potentially confidential information about the clients to get leaked. It concluded by stating that in the modern world of cutting-edge technology, attorneys have to be extra careful not to leak confidential client information. Finally, Spivey's article, "Post-Death Confidentiality of Estate Planning Communications between Attorney and Client," deals with the way attorney-client communication is affected after death (2003). This varies from state-to-state, but can greatly affect what evidence is presented in front of certain courts (Spivey, 2003).

The articles in this category are much more vague because the category in and of itself is much more vague than the other two, mainly because the full effect of a lawyer's communication on all aspects of the court covers a much wider scope than how jurors respond and the actual styles employed by lawyers. However, considering the articles listed, it would seem that communication can play a great role in many different aspects of the courtroom. The literature involved demonstrates that communication can affect the verdict, the perceptions of the members of the jury, and the various ways that the information is given and received inside the courtroom.

Lawyer's Communication Style.

The final question concerns the communication styles most employed by lawyers. Hobbs, McElhaney, Smith, Spence, Weingart, Uviller, and Spivey all wrote articles on this topic. In Hobb's article, "Is That What We're Here About? A Lawyer's Use of Impression Management in a Closing Argument at Trial," he discusses how lawyers interpret evidence (2003). However, the author's findings pertain only to African-American lawyers because his study was conducted using only African-American participants. The article states that a lawyer needs to take into consideration spontaneity, personalization, proverbial statements and cultural references, phonological variants, signifying, and 'tonal semantics' (Hobbs, 2003). In the article "Keep it Simple," McElhaney contends that the key to a lawyer's communication skill is simplicity (2010). On the other hand, Spence's article, "The Art of Argument," states that listening skills are a lawyer's biggest asset (1995).

Smith's "Winning the Communications Strategies for Defense Lawyers: Anywhere" does not actually cover communication anywhere, but rather in only one small county. The article focuses on the fact that lawyers need to be very careful about what information they publish about the cases on which they are working. Weingart uses specific articles to point out communication theories important to law (2010). The main idea is that many different perspectives and theories can be applied to the same case in order to see all dynamics of the communication (Weingart, 2010). Uviller's article, "The Lawyer as the Liar," focuses on the difficult situation in which lawyers find themselves, conflicted between their duty to be truthful and their ability to contain the confidentiality of their clients. The most important aspect of the lawyer, according to this author, is his or her responsibility to the client. Finally, Spivey writes about a lawyer's communication with deceased clients (2003). He states that lawyers need to strictly obey individual laws in their states regarding these regulations (Spivey, 2003).

Viewing all of these articles, it would seem that a few aspects are apparent concerning this part of my paper. First, a lawyer's most important communication skill is certainly not a universally accepted topic; second, many studies focus on a specific group of people, rather than attorneys as a whole; and third, there seems to be a very special relationship in the realm of client-attorney confidentiality that has a different type of consideration than any other attorney communications.

Several broad conclusions can be reached based upon these aforementioned articles. First, communication constitutes a major factor in the courtroom. Its far-reaching effects can influence everyone in the courtroom in a variety of ways, including the judge, the jurors, and the attorneys. And second, communication also can alter the outcome of a case based upon both the manner in which it is presented and whether or not the attorneys have properly executed the guidelines of attorney-client confidentiality.

Methods

Participants

Thirty-four samples were used for this project. The samples were all articles from scholarly peer-reviewed journals. These samples were all gathered from Coastal Carolina University's library webpage database: www.coastal.edu/library. Upon visiting the website, searches were completed by selecting journals by databases under the subject categories of communication, law, political science, psychology, and sociology. Main databases used to gather the information included Academic Search Premiere, Communication and Mass Media Complete, and JSTOR, among others. Search terms used included, but were not limited to:

- Communication
- Nonverbal Communication

- Verbal Communication
- Attorney
- Lawyer
- Judge
- Jury
- Court
- Courtroom
- Client

When the results surfaced from the search of databases, the researcher read each abstract to those articles that seemed applicable to the research topic at hand.

Procedure

Samples that seemed applicable based upon the aforementioned search were then downloaded in PDF form and perused for content. After reading these chosen articles, those containing all of the variables, that will be listed later, were printed out using an HP Photosmart 4600 series printer. Ultimately, thirty-four articles were chosen for this project, and all were used.

The samples for this project were all found by applying this method between August 2010 and April 2011. For a full list of articles and the journals from which they came, see Appendix B. All samples were then read and annotated using high lighters and ball point pens. After the samples were read, they were hole-punched with a three-hole punch device and put into a binder, divided according to the variables. The variables of this project are 1) the type of communication; 2) subject of the sample; 3) the type of legal case; and 4) whether or not the type of legal training of the attorney involved was mentioned.

The samples were divided first according to the subject of the sample. This division was made using stick-on tab dividers labeled with a ball point pen. After this division was completed, the articles were once again reviewed, specifically looking for the variables of the project. Each article was numbered one through thirty-four. Using a Coding Sheet (See Appendix A), the variables were recorded using “X” marks. When a sample contained a specific variable in a category, it was recorded using an X.

After the information was recorded on the Coding Sheet, the percentages of each variable were figured out. For some articles, each variable was not mentioned, which explains why some percentages do not equal 100 within the results section. To factor the percentages of each variable, the number of samples that contained that variable was divided by 35- the total number of samples. The resulting decimal number was the percentage of samples that contained that variable. After completion of this coding system, the system was repeated by a participant outside this research project. Five articles were randomly selected and coded to ensure that the coding system was fair, unbiased, and repeatable. The results were at a ninety-one percent precision rate.

Results

Of the thirty-four peer-reviewed articles, some were not used in all categories and, therefore, the percentages differ at times from totaling 100. The subject of the samples was the judge in 5.7% of the samples, the jury in 37.1% of the samples, the client in 8.6% of the samples, and the attorney in 45.7% of the samples. In 42.9% of the samples, training of the attorney was mentioned, while in 57.1% of the samples it was not. In 24.2% of the articles, verbal communication alone was mentioned, in 21.2% of the articles nonverbal alone was mentioned, and in 48.6% of articles both types of communication were mentioned. The type of case was not

mentioned in 62.9% of the samples, while criminal cases were present in 32.4% of the samples, and civil cases in 2.9% of the articles.

Discussion

The results of this project point to where this research has prospered and where this research might need more development. Looking at this topic through meta-analysis, several general points become relevant. It would seem that research in this topic area has been quite developed in the fields of all levels of communication, verbal and nonverbal. Research in this area can continue to develop by more closely examining the specifics concerning the process involved in the effects of verbal communication on the outcome of a trial, or how nonverbal communication alone also can affect the trial's outcome.

Under the variable of type of communication, many articles provided an abundance of important insight. The level of nonverbal communication was a very important topic among the samples that were analyzed. Some major factors that are taken into consideration when an attorney communicates are spontaneity, personalization, proverbial statements and cultural references, phonological variants, signifying, and tonal semantics (Hobbs, 2003). In some places, there has been controversy due to the nonverbal communication of certain attorneys. Attorneys are attempting to use their nonverbal cues to sway the jury to believe in what they are representing (Schmitt 1997). According to Diane M. Badzinski and Ann Burnett Pettus, the nonverbal behavior of juries, attorneys, witnesses, and defendants are all modified based on the nonverbal cues that the judge gives (1994). Therefore, attorneys can not only affect others with their nonverbal communication, but they can also be affected by others'.

Generally, one important piece of information about communication, both verbal and nonverbal, in the courtroom is that simplicity is key (McElhaney and Hutchenson, 2010).

Communication in the courtroom is a two-way street, and it is important for attorneys to not only speak but also listen to what is going on in the courtroom and react accordingly (Spence, 1995).

In the area of the type of case, much more research needs to be done on civil cases. While there was generally a lack of pertinent information on the type of case, most times, when the type was listed, it was a criminal case. This is most likely because criminal cases are seen as more exciting and more emotional. Therefore, researchers are more likely to observe these cases for the more obvious communication cues. However, observing more civil cases would be helpful as well. Not all communication is as blatant and emotional as the communication in criminal cases might be. In addition, the ways that attorneys conduct themselves in a civil case and the communication they perform could bring an entirely new aspect of research in this area. Researchers in this area should also begin to list the type of case from which their research was conducted. This helps to recognize how attorney's communication may differ according to the type of case.

The criminal cases that were the main focus of many articles included several infamous ones. Gail Ramsey pointed out how O.J. Simpson's attorneys must have done quite a good job communicating his innocence, given that he was acquitted after a murder trial that seemed so clearly to point to his guilt (1999). Simpson was a former football player who allegedly killed two people. When he would not turn himself in, the car chase that pursued, too, became televised. His trial is sometimes referred to as the trial of the century, since it was televised for America to watch.

In R. Phillip Taylor's article in which he applies communication theory to legality, Taylor uses the Ted Bundy case as an example (1982). Ted Bundy was a famous serial killer and rapist. He killed at least thirty women in many states in the United States. He targeted

attractive girls and would lead them in in a variety of ways. He infamously escaped from prison during his killing spree to continue murdering. Indeed, his story is one of interest .In both of these examples from the sample articles, the authors purposefully used famous cases that readers could readily remember. This example points to another main reason that the criminal cases are utilized more than the civil cases. Criminal cases often make it to the news much more readily than civil cases. So, if an author wants to refer to a famous case that many people can acknowledge, it is likely it will be a criminal case.

While many cases within the articles presented the attorney or the jury as the main subject, further research should be done focusing on the judge and client. In many states, judges make the same decisions as juries. Many articles focused on the jury because they make the ruling. Obviously if the attorney's communication affects the way the jury reacts it will, in turn, affect the way the jury will decide the verdict. Because in many cases, the judge too has this power, future research should focus more on the judge. When an attorney has his or her client on the stand, the way the attorney communicates with the client can affect the way the client responds. Clients' responses on the stand are one major feature that the ruling of a case is based upon. In a case in which a decision of innocence or guilt is to be determined, then what that client says is essential. For this reason, research should expand greatly on the methods in which the attorney's communication with a client in court can affect the outcome of the case.

In general, many of the jurors that are being polled in the experiments are people who are considered to be talkative people themselves (Wigley 1995). Therefore, they probably appeal more to attorneys who appear to be more outspoken, which could skew some data about what type of communication the jury most prefers from the attorney. Jurors also sometimes have a hard time understanding the instructions given by the judge at the beginning of the case (Miles

and Cottle, 2011). At the beginning of each case, the judge will tell the jury certain facts of the case and general points of law. However, sometimes this information is put so simply, such that it is no longer comprehensible or is simply too confusing for the average person to understand (Miles and Cottle 2011). In these cases, the jury might not be able to understand what the attorney is communicating at all, and will therefore, rate any communication by him low. It was also found that the physical touch of an attorney can affect the way a jury feels about his or her communication style. When a male attorney physically touches his client, for instance, the appeal rating from the jury increases (Waters and Moore, 1994). But jurors are not the only onlookers in the courtroom susceptible to the attorney's communication tactics.

One article that specifically referred to the ways that attorneys can appeal to judges gave specific instructions for the most effective ways to communicate. The results of this project show that there are several ways attorneys should go about appealing to judges with their communication skills. For one, graphics and trial exhibits go over very well. This adds a visual element to the verbal communication that is being presented to the judge. Secondly, the lawyer should not read his or her opening statement because it makes the argument seem overly rehearsed. Finally, attorneys who are respectful always appear better in a judge's eye (Perry, 2008).

More insight into communication training could greatly help law schools prepare their students for the courtroom. As this research shows, clearly there is a link between an attorney's communication style and the outcome of the trial. Therefore, law schools should begin to tailor their classes to help attorneys communicate in the most effective way possible. If this training begins in law school for those attorneys who will appear in court, then they will know how to effectively communicate from the very beginning of their careers.

An article by Pamela Hobbs pointed to the fact that most lawyers are simply “expected to be skilled at language” (2008, 331). Although this training has been mentioned often, it would seem that it is not necessarily always the primary focus of law schools. Some law schools limit speech training and put emphasis on written communication (Parkinson, 1981). Mollie Condra and Courtney Hudson recommend that communication scholars should mentor law students who have not received much communication training (1996). At the beginning of law, rhetoric and oratory were very important and the keys to the practice of law (Sellers, 1993).

This meta-analysis reveals that while great strides have been made within this area of research, there is still much work to be done. Generally, this area of research is one that has been extensively observed and studied, so it would seem that a meta-analysis is the best method of choice toward this end. However, this project could have been bettered by incorporating more peer-reviewed articles, since both time and resources limited the total number of articles that were available for this project. Furthermore, had more articles been evaluated, some of the gaps that were discovered in this particular research might not have been necessarily present; the results could have been skewed if there was not enough data to give an accurate view of the entire field of this type of research. More careful coding could also have helped to improve this meta-analysis. Certain variables in the articles were not completely apparent and required some interpretation. Had the variables been more specific or had the criteria for the variables been more specific, then the data might have yielded more insightful results. In addition, observation of an actual courtroom might have well-supplemented this research. Being able to offer an actual real world scenario to which the research applies might have greatly enhanced the research evaluation.

Overall, this topic is one that deserves the amount of research it has received. The United States is a country that relies so much on having an effective and fair legal system. The guiding light in any courtroom is the communication that is being exchanged: that is how the information about the case is learned, that is how the two sides of the case are presented, and that is how the decision is made and presented. Without communication, the court system would obviously cease to exist. Hence, to ensure that the court systems in the United States continue to be effective and achieve the goal that they are set up to achieve- justice- the study of communication in the court systems is an on-going, never ending topic that will only grow more and more with time.

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Appendix

[illegible]

B. List of Samples

“Restrictions on Lawyers Communicating”

“Nonverbal Communication of Trial”

“Is that What We’re Here About?”

“Oops! Can I take it Back?”

“Attorney and Communication and Impression Making in the Courtroom”

“Keep it Simple”

“Juror Perceptions of Participants in Criminal Proceedings”

“Examining Argument in a Naturally Occurring in Jury Deliberation”

“Legal Beat: Judges Try Curbing Body Language Antics”

“Winning the Communications Strategies for Defense Lawyers: Anywhere”

“Art of Argument”

“Post- Death Confidentiality of Estate Planning Communication between Attorney and Client”

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“Jury Tensions: Applying Communication Theories and Methods to Study Group Dynamics”

“Disclosiveness, Willingness to Communication, and Communication Apprehension as

Predictors of Jury Selection in Felony Trials”

Information-Seeking Behavior of Justices During US Supreme Court Oral Arguments

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